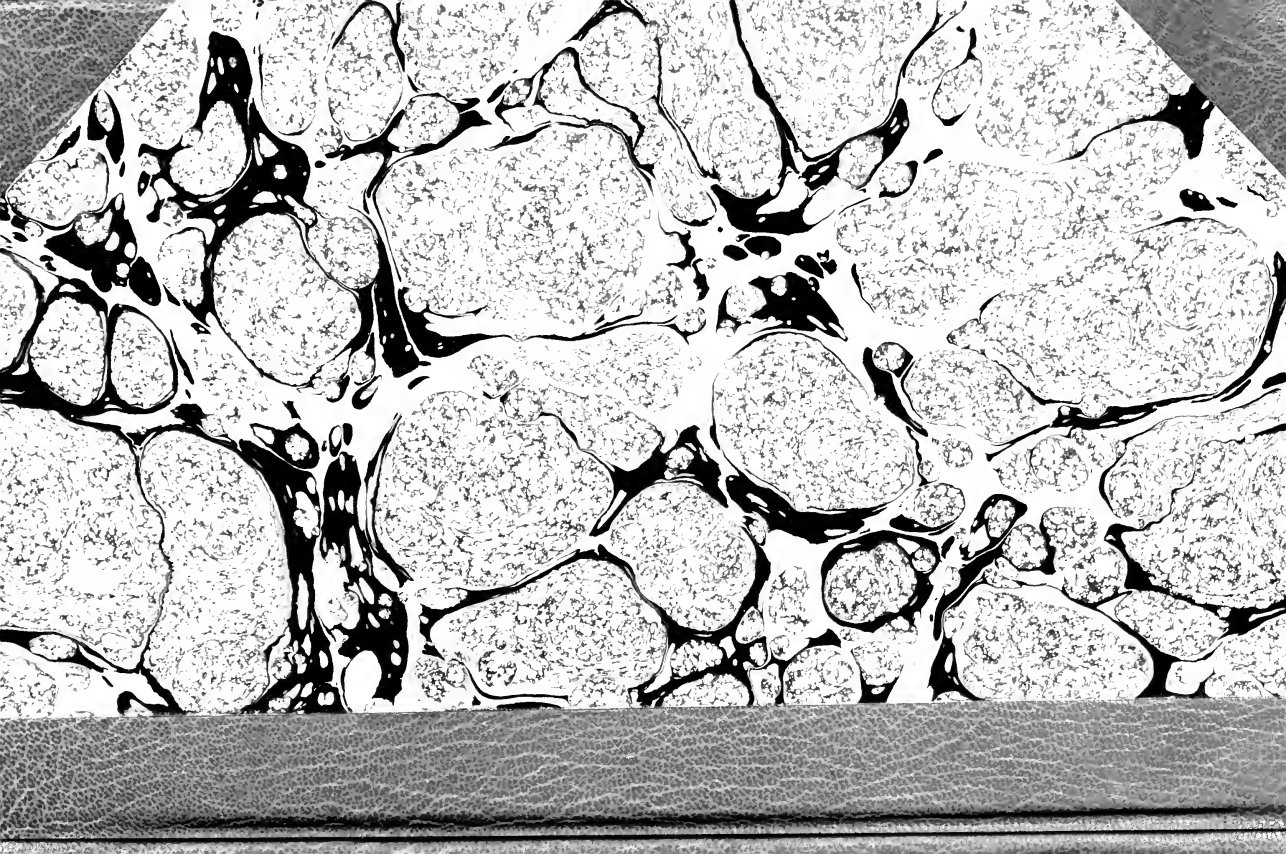

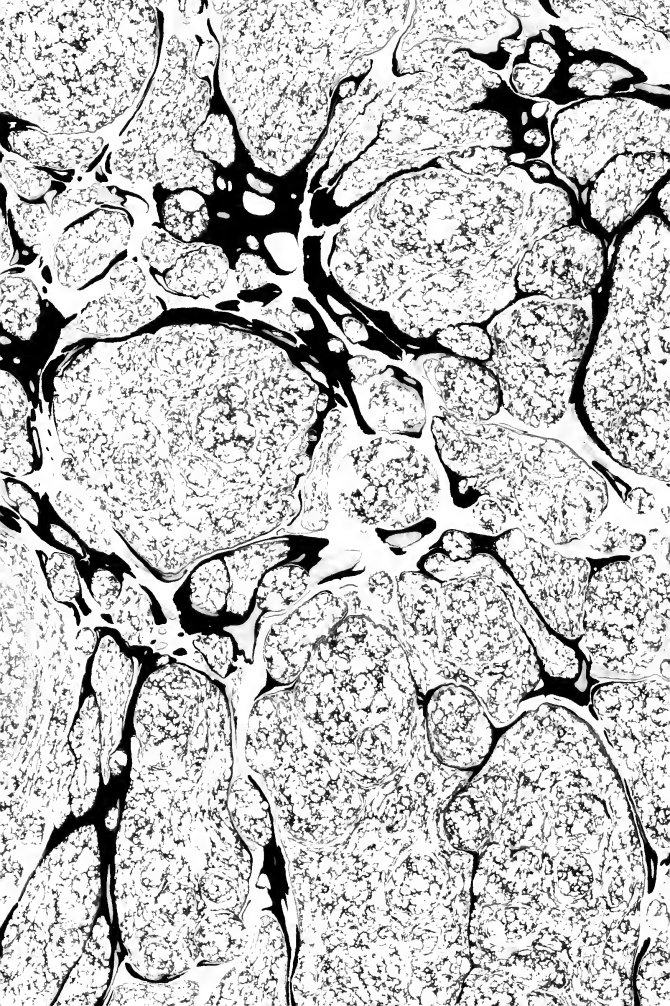

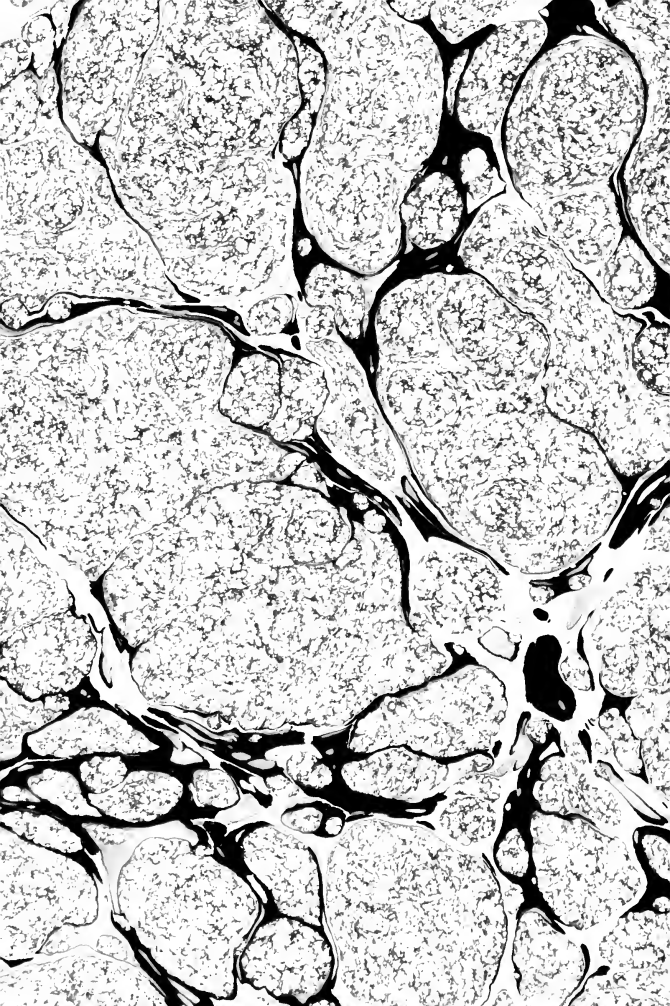

In the Court of Claims.

ON THE PETITION OF THE ILLINOIS CENTRAL RAILROAD COMPANY.

Brief of the Solicitor of the United States.

This is a claim for $45,000, paid the United States for a conveyance by deed made by the Secretary of War, dated October 14, 1852, of a part of the Fort Dearborn military reservation, situated in the city of Chicago. It is contended that the company was entitled to the land, in virtue of two previous legislative grants; one by act dated Sept. 20, 1850, (9 Stat. p. 466,) entitled "An act granting the right of way and making a grant of land to the States of Illinois, Mississippi and Alabama, in aid of the construction of a railroad from Chicago to Mobile;" and the other by act of Aug. 4, 1852, entitled "An act to grant the right of way to all rail and plank roads, and macadamized turnpikes, passing through the public lands belonging to the United States." 10 Stat. p. 28.

It is alleged that the company made claim, in due form and to the proper public officer, for the land, in virtue of one of these grants, but it was rejected; and as the land was necessary to them, and the delay attendant on procuring it from Congress could not be submitted to, they proposed to purchase, which was acceded to, and the deed given and accepted, and possession taken.

There is no evidence that the land in question is on the line or terminus of the road, as surveyed under the authority of Illinois, in pursuance of the act of 20th Sept., 1850.

There is no proof that any such claim was ever heretofore made. If made, however, it was abandoned, and the deed accepted and possession taken under it, which estops them from denying the validity of the title so acquired. Brown vs. Hinman, 14 I. R. 292; 7 Ib. 157; 6 Ib. 34; 1 Caine, 444.

But, for the purposes of this case, it is immaterial whether the title was good or not. The Government had the possession with claim of title, and the claimants got this; and the advantage of it to them was worth—as evinced by the best evidence, their own act and present admission—all the money they paid.

It would be easy to show, if the question were open, that the grant of the right of way through the public lands, and the grant of alternate sections for the purpose of constructing railroads, and also for sites for watering-places and depots on public lands, made by the acts referred to, did not apply to those parcels of ground which had been set apart or

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appropriated by proper authority to the special use of any department or branch of public service. The term "public lands" does not apply to all land owned by the United States. No one would include the grounds of the Capitol or those about the President's mansion, at the Washington Arsenal and Navy Yard, or other public grounds and squares in this city, in a provision respecting public lands; and yet in one sense they are public lands, being the property of the Government or the public. The term applies only to lands subject to sale and entry, or which will be subject to sale and entry at the land offices, and not to those tracts or parcels which have been purchased or reserved for public use, in connection with forts, arsenals, magazines, hospitals, or other public buildings.

And it is remarkable that this principle has already been applied by the Supreme Court of the United States to save this property from other speculators, who, in like manner, attempted to grasp it by bringing themselves within the language of a law relating to the public lands. The case referred to is that of Wilcox vs. Jackson, 13 Peters, 513. The land was entered under the pre-emption laws by one Beaubien, an army contractor, who had been suffered to reside on it, and who had assigned his claim to Murray McConnell. McConnell claimed that the entry was legalized by the 4th section of act of 26th of June, 1834, authorizing the sale of all public lands in that district, without any reservation in the law which would embrace and save the Fort Dearborn reservation. The Supreme Court say: "In the first place, we remark that we do not consider this law as applying at all to the case." "But we go further, and say, that whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law or proclamation or sale would be construed to embrace it or to operate upon it, although no reservation were made of it." The court then proceed to consider the results to which a contrary doctrine would lead in the appropriation of the fort and public buildings, which had cost hundreds of thousands, by a person who had paid the Government $94 61; and conclude by saying, that a principle which leads to such startling consequences cannot be a sound one.

In the case of the United States vs. Chicago, (7 Howard, 193,) the court, referring to the case of Wilcox vs. Jackson, say: "in that case, this court decided that this was a legal appropriation of that quarter-section of land to a public purpose, and exempted it from the rules as to the mass of public lands and their usual liabilities."

The court, in the language already quoted, say distinctly, that no saving (although such exceptions are very often inserted out of abundant caution) is required in an act making grants of public land, to protect lands previously appropriated from the operation of such acts. Such exceptions are entirely unnecessary; and, therefore, they proceed to say the Fort Dearborn reservation is exactly on the footing with the grants to individuals and to the State of Illinois, which are expressly excepted in the act of 1834; and, therefore, the proviso of the act of August 4,

1852, p. 28, vol. 10, not noted by the claimant, although it is contained in one of the acts relied on by him expressly saving from its operation any lands not subject to private entry, and those reserved where lands are not surveyed, was, like the saving in the act of 1834, and various similar provisions in other acts relating to the public lands, wholly useless.

The claimants betray a consciousness of this, and endeavor to present a case differing from McConnell's, by alleging that the Fort Dearborn reservation, or at least that part of it sought by the Railroad Company, had been abandoned as a military station at the time the act of 1850 became a law.

The allegation is unsupported by proof. But if the fact was proved that the fort was no longer garrisoned, and had not been for several years, and the part sought by the Railroad Company not used for any public purpose, it would not help the claim.

The court say, in the language above quoted, that when such reservations are once made, the land is severed from the mass of public lands, and is exempt from the operation of acts of the character of that of 1850, without any further reservation. This land was reserved in 1824, and it appears by the case in 13 Peters to have been in the possession of the United States and their officers down to the time of the trial of that case; and it appears by the petition here to have been in the possession of the officers of the United States, and by the plat accompanying the deed from the Secretary of War to the Railroad Company, that the public stable was situated on that part of the land here claimed.

It is not pretended that there was ever any formal re-assignment of this property to the Land Department by the War Department; but it is assumed that mere non-user by the War Department of the property for a military post for some years, together with the sale by the Secretary of War, under orders of the President, of a part of the reservation, under authority of the acts of 3d March, 1819, (3 Stat., p. 520,) 26th May, 1824, (4 Ib. 51,) 28th April, 1838, (4 Ib. 264,) subjected the part in question to appropriation under the general acts referred to, as if the reservation had been removed or had never existed.

Whether the acts quoted apply or not, is immaterial as affects this question. It appears by the opinion of Judge McLean, in Rock Island Bridge case, 6 McLean's Rep., 517, that doubts have existed as to the operation of these acts, and whether under them the War Department, by direction of the President, was authorized to dispose of the sites of such forts as should become useless as forts after the date of the act of 1819; and the judge is of the opinion that the act was not prospective; but he is equally clear, that land once reserved for any public use, and set over by the Land Department to another department for such objects, does not revert to the Land Department till it is formally turned over, as was done in the case of Fort Armstrong.

(See the letter of the Secretary of War to the Secretary of the Treasury, then the head of the Land Department, dated 11th February, 1848, by which the site of Fort Armstrong "is hereby relinquished and

placed at the disposal of the Department which has charge of the public lands.")

The judge thinks that lands retroceded in this way, and then advertised, become afterwards subject to private entry, and then are subject to be condemned and appropriated for the public uses, as for roads, &c., under State authority. The mere ownership of land by the General Government does not exempt it from condemnation for such purposes, he decides, but he distinctly allows that a reservation unrecalled in the manner that at Fort Armstrong had been, would prevent the condemnation of the property under State laws. And this is declared with equal distinctness in the case of United States vs. Chicago, where the question was, whether streets could be opened within the unsold reservations, when it was decided that the reservations unsold could not be touched under such authority, because, among other reasons, the Government had not parted with the title, and because it had been set apart for public use, &c. See 7 Howard, p. 194.

This was in 1849. Judge McLean, in the opinion given last winter in the Rock Island Bridge case, says, (p. 4 of pamphlet ed.,) "the possession of it (the Fort Dearborn reserve) for public purposes has never been abandoned;" whereas he says of the Rock Island reserve, "the possession of it was abandoned, and the right of the Government released through the same authority by which it was appropriated."

The Rock Island case was an injunction brought by the United States against the construction of the bridge, on the idea that it was an obstruction to the navigation of the Upper Mississippi; and the attempt was made to interpose the Fort Armstrong *reserve* to maintain the injunction—Congress not having legislated, under its power, to regulate commerce so as to authorize the courts to declare the bridge a violation of any statute law on that subject.

As already seen, the court decided that the reserve, having been abandoned, could not be made available; and the ground was then taken, that although abandoned as a military post, it was property of the United States not subject to be condemned for railroad purposes under laws of Illinois. This is also overruled by Judge McLean, because the reserve was abandoned, and he declares it had thereby become subject to condemnation.

It was argued that the tract here was subject to condemnation, and this opinion of Judge McLean quoted as authority, although on the face of the opinion the Judge expressly distinguishes between the condition of the Fort Dearborn reservation and that of Fort Armstrong.

But if the land in question had ever been subject to condemnation, there was never an effort made to have it condemned by the Railroad Company; and no allegation is made in the petition to that effect, and no claim based on such grounds. All right of that kind must be based on the provisions of the 3d section of the charter, and that authorizes proceedings against any property for condemnation only in the event that the owner will not voluntarily make terms which are accepted. Here terms were voluntarily offered, which were accepted. The claimant's counsel

argues that no such proceedings are required with respect to property of the United States, because that point was not made against the company in the Bridge case. That proceeding was to pull down a bridge already constructed, as an obstruction to navigation.

But in the United States vs. Chicago, among reasons for the injunction granted, the court say, "nor was any compensation proposed or made, as in other cases, for condemning this land and damaging the buildings thereon." p. 195.

What is said in the petition about the price is not true. No one of those to whom Lieutenant Webster referred the question estimated the value at less than $30,000. Webster himself was of the opinion that it was worth $90,000, and would have brought that sum, and perhaps more, at the time of the sale, if the street were opened and the land offered at public auction. [See his letters.]

A proviso in the act of August 4, 1852, 10 Stat., p. 28, is, "that none of the foregoing provisions shall apply to or authorize any rights on any lands other than such as are held for private entry and sale, and such as are unsurveyed and not held for public use by erection or improvements thereon."

This was not subject to private entry and sale.

It had been surveyed.

It was held for public use by erection and improvements thereon.

Nor does the act of 20th September, 1850, apply, because by its terms, when any part of any of the sections designated by even numbers shall have been sold, the Railroad Company may enter other sections. Here part of a section had been sold by the United States. Now, whether the act *required*, in such cases, the selection of other land in lieu, or merely gave the liberty of doing so, is immaterial. If it was a right to elect, no doubt they have elected to take other land. At all events, there is no evidence that they elected to take what remained of the 10th section. Besides, the grant of way extends only *to* the city, not *into* it, and the alternate sections extend no farther; and, therefore, the company had no claim either by the grant of way or of sections.

The 6th section of the act of 20th September, 1850, vol. 9, p. 466, enacts "that the lands hereby granted to the State shall be subject to the disposal of the legislature thereof for the purpose aforesaid, *and no other*."

The 2d section also provides that these lands "shall be disposed of only as the work progresses, and shall be applied to no other purpose whatever."

The grant of the lands and rights made by the State of Illinois under the act of 10th February, 1851, was not in conformity to these and other requirements of the act of 1850, and was therefore invalid.

M. BLAIR.